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BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, NO. 01-244
(Judge Charles W. Cope)

Case No. SC01-2670

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SPECIAL COUNSEL'S MOTION TO STRIKE MOTION

TO DISMISS OR, IN THE ALTERNATIVE, TO STRIKE PORTIONS THEREOF

The Special Counsel hereby moves to strike Respondent's Motion to Dismiss, for Discovery and for Hearing on the Grounds of Selective Prosecution and Vindictive Prosecution (the "Main Motion to Dismiss") and Motion to Dismiss Count III, for Discovery and for Hearing on the Grounds of Selective Prosecution and Vindictive Prosecution (the "Motion to Dismiss Count III") or, in the alternative, to strike certain portions thereof, and states:

Certain Portions Violate Article V,

Section 12(a)(4) of the Florida Constitution

1. In the Main Motion to Dismiss, Judge Cope makes several allegations regarding an alleged separate investigation pending before the Investigative Panel. These portions include the last sentence of paragraph 10, the entirety of paragraphs 11, 106, 108, 110, 111, 112-15, 117, and 119-23 and Exhibits 5, 6, 9, and 11.

2. All proceedings by the Investigative Panel are confidential unless and until such time as formal charges are filed. Art. V, § 12(a)(4), Fla. Const.; FJQCR 23(a). The confidentiality requirement is intended not just to protect the subject judge against publicized complaints that are not supported by fact, but also to protect the witnesses providing

information to the panel against potential reprisals. See In re Graziano, 696 So. 2d 744, 751 (Fla. 1997) ("[C]onfidentiality allows the JQC to process efficiently complaints from any and all sources while protecting the complainant from recriminations and the judicial officer from unsubstantiated charges.") (citing Forbes v. Earle, 298 So. 2d 1, 4 (Fla. 1974)); see also In re Frank, 753 So. 2d 1228, 1241 (Fla. 2000) ("We request that the Commission be ever mindful of the implementation of those rules relating to confidentiality which give to all involved in the Commission's proceedings confidence that confidentiality will be observed." (emphasis added)).

3. Because of the confidentiality requirements, the Special Counsel is prohibited from confirming or denying the accuracy of the accusations and allegations regarding this matter. Assuming for the moment that Judge Cope's allegations have any basis at all in fact, then inclusion of these paragraphs and exhibits violates the constitution and the rules of the JQC and threatens the constitutionally mandated protection of witnesses during an investigation. As such, they should be stricken forthwith.

Certain Portions Are (or at Least

Purport to Be) Confidential Settlement Communications

4. Additionally, several portions of both the Main Motion to Dismiss and the Motion to Dismiss Count III purport to disclose the substance of settlement negotiations between the parties. These portions include the following:

1. Main Motion to Dismiss
 - a. last sentence of paragraph 14,

b. the entirety of paragraphs 129-44, and

c. exhibits 16 and 17

2. Motion to Dismiss Count III

a. the entirety of paragraphs 28 and 30-38

b. the first full paragraph on page 30,

c. all but the first and last sentence of the paragraph beginning on page 30 and carrying over to page 31, and

d. all but the first sentence of the last full paragraph on page 3.

5. Settlement negotiations have long been considered privileged and confidential for sound public policy reasons. See Mutual Ben. Health & Accident Ass'n v. Bunting, 183 So. 321, 326 (Fla. 1938); see also § 90.408, Fla. Stat. ("Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value."); Benoit, Inc. v. District Bd. of Trustees of St. Johns River Comm. College of Fla., 463 so. 2d 1260, 1261 (Fla. 5th DCA 1984) (clarifying that prohibition applies to all aspects of negotiations, including statements of facts); Atwater v. Gulf Maintenance & Supply, Inc., 424 So. 2d 135, 136 (Fla. 1st DCA 1982) (all parts of settlement offers are privileged).

6. During settlement negotiations, parties discuss and offer to agree to compromise on factual and legal issues. They should be free to have these discussions without any fear that anything they say or write (other than a final settlement agreement) will be disclosed to the tribunal or to the public. The Florida Supreme Court noted long ago that offers to stipulate to certain facts in return for a settlement "cannot be treated as an assertion

representing a party's actual belief" and "such an offer does not ordinarily proceed from and imply a belief that the adversary's claim is well founded." Bunting, 183 So. at 326.

7. Because any settlement negotiations are confidential, the Special Counsel is unable to comment on the veracity of Judge Cope's allegations or the authenticity or context of the attached exhibits and is also unable to tell "the rest of the story" to the extent any of Judge Cope's allegations have a grain of truth. Accordingly, these paragraphs and exhibits should be struck forthwith.

The Motions Should Be Stricken in Their Entirety

8. To adequately remedy the improper disclosure of confidential information, the Motions to Dismiss should be stricken in their entirety. Alternatively, the referenced portions should be stricken.

WHEREFORE, the Hearing Panel should strike Respondent's Motion to Dismiss, for Discovery and for Hearing on the Grounds of Selective Prosecution and Vindictive Prosecution and Motion to Dismiss Count III, for Discovery and for Hearing on the Grounds of Selective Prosecution and Vindictive Prosecution or, in the alternative, to strike the portions identified herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and regular U.S. mail to: **Louis Kwall, Esq.**, Kwall, Showers & Coleman, P.A., 133 N. St. Harrison Ave., Clearwater, Florida 33755; **Robert W. Merkle, Jr., Esq.**, Co-Counsel for Respondent, 5510 W. La Salle Street, #300, Tampa, Florida 33607-1713; **Judge James R. Jorgenson**, Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Ave., Miami, Florida 33175-1716; **John Beranek, Esq.**, Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32301; **Brooke S. Kennerly**, Executive Director of the Florida Judicial

Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602 this 3rd day of June, 2002.

By:
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